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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

MOTION TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO SUMMARY DOCKET.

TOM DAVIS AND
ERNEST A. MICHEL,
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Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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vs.

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Now comes the above named Respondent, and respectfully asks that this court dismiss the writ of certiorari herein granted on the 8th day of December, 1930, on the ground that the same was improvidently granted for the following reasons:

1. The petition for the writ of certiorari herein inaccurately and incorrectly stated the facts in connection with the arguments of counsel for the Respondent.

2. That under the long settled rule and practice in the State of Minnesota, any misstatements of counsel to the jury must be called to the attention of the court at the time in order to provide counsel with an opportunity to retract, and the court with the opportunity to admonish counsel and instruct the jury to disregard the statements made, and that

the failure of Petitioner to take exception or call attention to the remarks has resulted in a waiver of its claim, under the settled Minnesota practice.

3. That the verdict in a case, where the moral and legal rights are with plaintiff, could easily be sustained by a cold blooded resort to figures and mathematics.

4. Respondent further moves the court that the judgment of the State of Minnesota be affirmed because the question upon which the decision of the cause depends has been determined by many decisions of the Supreme Court of Minnesota, and because it has been the settled policy of the Supreme Court of the United States not to reverse causes on a mere question of practice nor where the points relied upon were not made in the trial court of the state and were waived under the state rule.

In the alternative, in the event the foregoing motions be denied, then the Respondent moves the court that the action be transferred for hearing to the summary docket of this court because the case is of such a character as not to justify extended argument.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys of Record for Respondent,
Minneapolis, Minnesota.

(Same Title.)

NOTICE OF MOTION.

The petitioner is hereby notified that respondent will, on the 12th day of January, A. D. 1931, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing and annexed motions, and each of them, and the brief in support thereof, hereto attached, all of which are now and herewith served upon you.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Received a copy of the foregoing notice and the brief thereto attached, by personal service thereof, this..... day of December, 1930.

....,
Attorneys for Petitioner.

STATEMENT OF FACTS.

In this case a petition for writ of certiorari was granted, the review being limited solely to the claim of improper conduct of counsel for plaintiff in his argument to the jury.

The facts, generally, appeared in the petition for certiorari in Respondent's brief in opposition thereto. However, a more detailed statement as to the facts bearing upon the immediate question may be helpful to the court.

1. The petition for the writ of certiorari herein inaccurately and incorrectly stated the facts in connection with the arguments of counsel for the Respondent.

On Page 21 of the petition for certiorari, it is stated that Respondent's counsel represented railroad companies generally by saying "that they are perjurers and liars." The words in quotation marks are followed by reference to Record, Page 561. The record does not bear out this statement. It is incorrect and untrue.

This isolated statement, as it appears in the petition, would *lead the court to believe that counsel had called railroad witnesses perjurers and liars. Nothing was further from the truth.* This case was hotly contested. It was vigorously fought by the *attorneys for the railway company whose argument does not appear in the record.* The part of the argument appearing at Page 561 of the Record, being Folio 1683, is not as above stated but the exact language is as follows:

> "I have often wondered if the time would ever come when *an injured man* could come into a court of justice without having a railroad company try to fasten upon him that *he* was a perjurer and a liar."

This is a lot different than calling railroad witnesses perjurers and liars.

Moquin had testified that as he lay on the ground, after having been thrown from the car, he *saw* the ice around the track and saw where the flanges of the car had cut into the ice. Moquin also testified that the brakeman Carr had told him "ice derailed that car." Carr, on the stand, vehemently and vigorously denied making any such statement. See Record, Page 561, Folio 1682.

Furthermore, defendant's section boss and section laborers put the lie squarely to Moquin, saying there was no ice over the rails. It was in answer to testimony of this kind that the statement of counsel was made. The statement, as it appears on Page 21 of the railway company's petition, would *indicate* that counsel called witnesses for the railway company perjurers and liars. *This is not the truth.* This was *not* done. Plaintiff's counsel merely stated that there was an attempt by defendant to fasten upon *plaintiff* that *he* was a perjurer and a liar. This is much different than calling railway company employees perjurers and liars.

Plaintiff could not have been mistaken about seeing the ice over the rails. If he did *not* see it and he testified that he *did*, he *was* a perjurer. Plaintiff's counsel simply stated that defendant attempted to fasten this charge onto him.

At Folio 1737, Page 579, counsel did state that he was fighting for the "under dog." This is a fact and certainly there can be nothing wrong in making this statement. If this be a crime, if it be wrong to fight for poor people, then many of the great lawyers of the past and present were guilty of misconduct. Daniel Webster, Henry Clay, and Abraham Lincoln took up the cudgel for the under dog.

One of the largest personal injury verdicts ever returned in the State of Minnesota was returned in a case where Mr. Pierce Butler, now an Associate Justice of this Honorable Court, was *attorney for the plaintiff*, and the Minne-

apolis Street Railway Company was the defendant. Any one who knows the methods of defense of the Minneapolis Street Railway Company will know that Mr. Butler certainly represented the under dog in that case.

Associate Justice Brandeis has often represented the under dog, and Chief Justice Hughes certainly fought for the under dog when he made his great fight against powerful insurance companies. The same thing could be said of other members of this Court. It is no crime to fight for the under dog.

The defense to the case was characterized as "ingenious and dishonest." Page 580, Folio 1738. When *three disinterested witnesses* testified that there *was* ice over the rails at the point of derailment and defendant brought in three or four employees to testify that there was *no ice* over the rails, there could be no question of a mistake. Some one was not telling the truth. Plaintiff's counsel very frankly told the jury that the defense was a dishonest defense. *It is dishonest to state that the track was in good condition and no ice on it when it appears by three disinterested witnesses that ice covered the rails to a depth of one or two inches.*

A reading of the petition for writ of certiorari gives an entirely *wrong impression* of counsel's argument. Counsel (who is not the writer of this brief) does argue forcefully to a jury, and does not mumble his words in talking to the jury, but we submit to the court that a reading of the argument merely shows a zealous advocate, earnestly striving to secure justice for his client.

It certainly cannot be the rule that an attorney can not argue for such sum as he believes proper and adequate for his client. From a reading of the entire argument of counsel it very clearly appears that, based upon the cold record, plaintiff was entitled to a larger award of damages than actually given to him.

THE WRIT WAS IMPROVIDENTLY GRANTED.

We feel that the statement appearing on Page 21 of the petition, citing Page 561, "that they are perjurers and liars" *mislead the court* into granting the writ. *On Page 561 of the record we find no such statement. The* statement is a misquotation and *might well mislead the court.* Plaintiff's counsel did say that the defendant was trying to fasten upon *him* (plaintiff) the charge that "*he* was a perjurer and a liar." (Folio 1683.) This is *very different* from the bald statement that "they are perjurers and liars."

Where a writ is improvidently granted, it should be dismissed.

See *Furness, Withy, etc., Co. vs. Yang-tsze,* 242 U. S. 430, 61 L. Ed. 409.

Houston Oil Co. vs. Goodrich, 245 U. S. 440, 62 L. Ed. 395.

2. That under the long settled rule and practice in the State of Minnesota, any misstatement of counsel to the jury must be called to the attention of the court at the time in order to provide counsel with an opportunity to retract, and the court with the opportunity to admonish counsel, and the failure of Petitioner to take exception or call attention to the remarks has resulted in a waiver of its claim, under the settled Minnesota practice.

The Federal Employers' Liability Act *was not intended to effect settled rules of practice in state courts.* Petitioner failed to comply with the state rule of practice. No substantial question, which would justify *overturning the state practice of Minnesota,* is presented by the petition. Under the Minnesota rule, which petitioner does not and can not dispute, exception must be taken to remarks of counsel at the

time they are made. This was not done. As Chief Justice Wilson, who wrote the opinion of the Minnesota Supreme Court said: *"The record was not protected."*

Under the Minnesota rule, it is the duty of counsel to call attention to any improper remarks so as to give opposing counsel an opportunity to retract and the court an opportunity to admonish the jury to disregard the statement. This was not done. The settled rule of Minnesota was not followed. The petition for certiorari might well have misled the court by referring to *New York Central vs. Johnson*, 279 U. S. 310, which was *not* a case tried in a *state* court, but was tried in a Federal Court. In that case *objections were made* to the argument *at the time*, the main complaint being that they were not sufficiently specific.

If the Supreme Court of the United States is to take jurisdiction of this cause, because of claimed error in the argument of counsel, it means that the Supreme Court is going to overturn the settled rule of practice which has always existed in Minnesota. Certainly this could not have been made to appear to the court at the time of the granting of the writ. Had this appeared, we feel confident that the writ would not have been granted.

3. That the verdict in a case, where the moral and legal rights are with plaintiff, could easily be sustained by a resort to cold figures and mathematics.

Under the statute of Minnesota, a new trial may be granted where it *appears from the evidence* that the verdict is the result of passion and prejudice. There is nothing in this record to show that it was the result of passion and prejudice. No amount of passion or prejudice could *change the fact that there was ice over the rails, as testified to by three disinterested witnesses.*

Passion or prejudice did not account for the verdict of $27,500.00, when under the cold facts the verdict could have been much larger. The court could calmly sit down with pencil and paper and, taking the admissions of defendant that plaintiff could not again do railroad work, the court could well figure his verdict to be higher than the sum returned by the jury.

A reading of the opinion of the Supreme Court of Minnesota shows that morally plaintiff was entitled to damages. It also shows that legally he was entitled to damages. A resort to mathematics will disclose that the verdict could have been larger.

Now, after a trial in the District Court, after the argument in the Supreme Court of the State of Minnesota, when it appears that no objection was made to the argument of counsel, a reversal is sought in the Supreme Court of the United States on a point which the Supreme Court of Minnesota said was waived because the "record was not protected."

Right, justice and morals are on the side of plaintiff. The law of Minnesota is with plaintiff. Legally, the railway company had no complaint because the "record was not protected." This was the holding of the Supreme Court of Minnesota. In a matter of practice, the state court is supreme.

4. Respondent further moves the court that the judgment of the State of Minnesota be affirmed because the question upon which the decision of the cause depends has been determined by many decisions of the Supreme Court of Minnesota, and because it has been the settled policy of the Supreme Court of the United States not to reverse causes on a mere question of practice nor where the points relied upon were

not made in the trial court of the state and were waived under the state rule.

Never, so far as we have been able to learn, has the Supreme Court of the United States taken jurisdiction of a cause *solely* because of a claimed error when that error related only to *a matter of practice* which was *solely for the state court.*

It would be a startling reversal of all rules were jurisdiction of this cause to be retained and the same heard and determined, solely because of the claimed error in the argument of counsel, *which was waived under the settled rule of practice of Minnesota.*

See decisions cited in the present case. *Moquin vs. Soo Line,* 231 N. W. 829.

We have found no decisions of this court holding that settled rules of state practice would be overturned because the case happened to arise under a Federal Act.

In *Chesapeake & Ohio R. Co. vs. DeAtley,* 241 U. S. 310, 60 L. Ed. 1016, Mr. Justice Pitney said, speaking of a complaint as to the form of certain instructions:

> "Although the present action was based upon a federal statute, it was *triable* and *tried* in a *state* court. Hence, *local rules of practice and procedure were applicable.*"

The question of making an objection or taking exception to the argument and giving counsel a chance to make corrections or retraction, and the court a chance to admonish the jury to disregard the argument—these are *matters of practice,* the same as rules of evidence, sufficiency of the pleadings, etc.

The Supreme Court of the United States has consistently

held that in actions under the Employers' Liability Act, *state rules of practice and procedure govern.*

In *Central Vermont R. Co. vs. White,* 238 U. S. 506, 59 L. Ed. 1433, Mr. Justice Lamar said:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy such as the form of the action, sufficiency of the pleadings, rules of evidence and the statute of limitations depend upon the law of the place where the suit is brought."

Under the rule in the DeAtley case this writ was improvidently granted. The argument in this case was not vicious. It was strong and forceful, but even if we should assume that the argument was the most vicious and prejudicial one imaginable, still "local rules of practice and procedure" would be applicable, within the decision of the DeAtley case, *supra.* It cannot be that it was the intention of the court to *overturn the DeAtley and White cases,* as well as many other cases of this honorable court holding rules of practice to be matters for determination by the state court.

In *Minneapolis & St. Louis R. Co. vs. Bombolis,* 241 U. S. 211, 60 L. Ed. 961, the late Chief Justice White said:

> "It was, of course, presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to *clearly contemplate the existence of a concurrent power* and duty of both *federal and state* courts to administer the rights conferred by the statute in *accordance with the modes of procedure prevailing in such courts.*"

In the alternative, in the event the foregoing motions be denied, then the respondent moves the court that the action be transferred for hearing to the summary docket of this

court because the case is of such a character as not to justify extended argument.

In the event that the motion to dismiss the writ be not granted and in the event that the motion to affirm be not granted, then this case should be advanced.

In these modern days of speed and efficiency, it should not be necessary that an injured man be dragged through all the courts of the land before there can be a final determination of a simple personal injury case.

No grave questions are presented and the matter should be hastily and speedily determined.

The not very commendable practice has grown up, and is increasing, as a search of the records of this court will show, of railroad companies applying for *writs of certiorari* in too large a number of cases where it is apparent that the purpose is largely "to play the string out" and to take the injured man to the last court in the land before payment be made to him. The question involved in this case can be adequately presented to the court in a very limited argument, and Petitioner very earnestly asks that the case be advanced for hearing, in the event that a dismissal be not ordered, to the end that the rights of the injured man and the railway company may be quickly determined.

The only thing which could give any color whatever to the position of the railroad company in this case is the statement in the opinion "that the verdict is excessive because of passion and prejudice."

The state court did not hold that *any other branch* of the case was affected by passion and prejudice but limited it to the *amount* of the verdict.

This does not mean that the passion and prejudice arose from the argument of counsel. It could not mean this, because the court specifically held this point to be waived.

The Minnesota court reduces verdicts as excessive on the theory that the excessiveness is due to passion and prejudice in many cases where there is nothing to indicate passion and prejudice *except the mere size of the verdict.* It is in *this* light that the present opinion must be considered.

As showing the practice in Minnesota, we call attention to the case of *Podrick vs. Great Northern R. Co.*, 128 Minn. 228, 150 N. W. 807. In that case a verdict of $35,000.00 for personal injuries was reduced to $30,000.00. The reduction was made *solely* because the court thought the amount was too high, *not* because *any passion or prejudice* affected it.

In the case at bar, the opinion of the Minnesota Supreme Court does not say that passion and prejudice affected the verdict on the *question of liability,* but solely that the verdict was excessive, appearing to have been given under the influence of passion and prejudice.

The applicable Minnesota statute is as follows:

Mason's Minnesota Statutes, 1927, Section 9325:

> "A verdict, decision or report may be vacated, and a new trial granted on motion of an aggrieved party, for any of the following causes materially affecting his rights: * * *
>
> 5. Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice."

Although this statute, in terms, requires that it must appear that the verdict was the result of passion and prejudice, the practice has grown up of granting new trials or reducing verdicts *because the court figures the amount too large.* In such cases, presumably, the passion and prejudice appears *from the mere size of the verdict.*

In *Carlson vs. Payne,* 150 Minn. 480, 186 N. W. 291, a

verdict for $57,789.77 was reduced to $45,000.00. In that case the plaintiff had lost both arms.

As stated by Taylor, Commissioner, who wrote the opinion of the court:

> "Defendant relied mainly on the contention that the verdict is excessive."

The verdict was reduced *but in no place in the opinion does it appear that there is any claim that the verdict was the result of passion and prejudice.* Nevertheless, it *was* reduced.

The two Minnesota cases last cited show the practice in the state of reducing verdicts if the court believes they are too large. Merely because the opinion in the present case stated that the verdict was excessive because of passion and prejudice does not taint or corrupt the entire verdict, as contended for by counsel for petitioner herein.

In any event, the passion and prejudice *extended only to the amount* of the verdict. The question of the *amount* of damages *is not a question to be considered by this court.*

The excessiveness of the verdict in this case was, in the opinion of the court, cured by reducing it to $22,500.00 from $27,500.00. It is the settled practice for the Supreme Court of Minnesota to reduce verdicts if the court deems them excessive. *This is done where no facts appear to give rise to the claim of passion and prejudice except the size of the verdict.*

If the verdict, as rendered, was excessive, this excess was cured by the reduction of the verdict. The *amount* of the verdict and the amount of damages to be returned is not a question for this court. Although the amount may be large, the matter is wholly for the state court.

In speaking of the question of damages in a case which

was tried in a state court, Mr. Justice Van Devanter used this language:

> "Finally, it is said that the award of $5,000 as damages for pain and suffering, even though extreme, for so short a period as approximately thirty minutes, is *excessive*. The award *does seem large*, but the *power*, and with it the *duty* and *responsibility*, of dealing with this matter, *rested upon the courts below*. It involves only a question of fact, and is *not open to reconsideration here*."
>
> *St. Louis, I. M. & S. R. Co. vs. Craft*, 59 L. Ed. 1160, 237 U. S. 648.

It is to be remembered that the Supreme Court of Minnesota had no difficulty in finding the defendant company liable. The sole question as to passion and prejudice was the *amount* of damages. The verdict as reduced represents the judgment of the Supreme Court of Minnesota on this question and cured any question of excessiveness.

There is no question but that the defendant is liable in some amount. This being so, argument of counsel could only have increased the *amount* of the damages returned. The *amount* of damages is for the jury in the first instance, and later for the Supreme Court of the state.

The real meaning of the decision of the Supreme Court of Minnesota is that in the opinion of the court the damages were too high. The Supreme Court of Minnesota said the point of any error in the argument of counsel to the jury was waived. This is a question of state practice. For the Supreme Court of the United States to consider this question now introduces a new, startling and revolutionary practice.

CONCLUSION.

Because of the misleading character of the petition for certiorari herein, the court was undoubtedly led into granting the writ. *The petition for the writ did not clearly advise the court that the Supreme Court of the State of Minnesota had held that the point was not raised.* We do not find this fact *clearly set forth* in the petition for the writ, but instead, on page 24, we find the statement that the Supreme Court of Minnesota held that the *failure to raise the point* was *non-essential* in granting the relief * * * because passion and prejudice influenced the verdict.

This is a misleading statement, because the Supreme Court of Minnesota, instead of holding the failure to make the objection *non*-essential, specifically held that it *was essential* that the objection be made and *the court specifically stated that the record was not protected* (Record, page 676).

The court further stated: "The rule of procedure in such case rests upon deep principles from which we should not depart. It is the settled practice" (Record, page 677).

This statement is *inconsistent* with the *misleading statement in the petition* on page 24 to the effect that the Minnesota court held that the omission—that is, the failure to make an objection to the argument—was "non-essential." To the contrary, the Supreme Court of Minnesota held it *was* essential. *It held that where no objection was taken, the point was waived.* Undoubtedly, the misleading statement in the petition led to the granting of the writ herein.

The writ was improvidently granted. It was granted because of a misstatement of the facts. This court should not be called upon to review a question which *is purely one of local practice.* To do so would be a departure from the

settled rules of this court. To do so would be to overturn the practice of many years.

Furthermore, the petition gives an erroneous impression of what counsel actually said to the jury. It conveys the impression that he called railroad witnesses perjurers and liars. This is not so, as appears from the actual statement made and heretofore quoted. Counsel merely stated that the railway company was trying to fasten this charge onto the plaintiff.

Respectfully submitted,

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